

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

TIMOTHY NEAL AUSEMA,

Defendant-Appellant.

UNPUBLISHED

October 18, 2002

No. 230233

Kent Circuit Court

LC No. 99-007516-FH

Before: Wilder, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of one count of second-degree criminal sexual conduct (“CSC”) in violation of MCL 750.520c(1)(a). The trial court sentenced defendant to four years on probation and one year in the county jail, with credit for time served. We affirm.

Defendant was charged with two counts of second degree CSC, MCL 750.520c, with a nine year old girl. Count 1 alleged that defendant intentionally touched the nine year old victim’s breast or clothing covering that area. Count 2 alleged that defendant intentionally made the victim touch his genital area and/or his penis or the clothing covering that area. A third count alleged fourth degree CSC with a 14 year old girl, however, defendant’s pretrial motion to sever the trial of Count 3 from the trial of Counts 1 and 2 was granted by the trial court.

After Count 3 was severed for trial from Counts 1 and 2, the prosecution filed a notice of intent under MRE 404(b) to introduce evidence regarding the CSC fourth degree touching alleged in Count 3. On the date of trial, defendant moved to exclude the evidence as more prejudicial than probative. The prosecution argued that the evidence was admissible under MRE 404(b) to refute the defense to be asserted by defendant that to the extent he touched the victim, any touching was accidental. After oral argument, the trial court ruled that the evidence was admissible for the limited purpose of assisting the jury in determining whether the touching alleged in Counts 1 and 2 was intentional or accidental.

During opening statements, the prosecution advised the jury about the other acts evidence. The trial court interrupted the opening statement to instruct the jury as to the limited purpose for which the evidence could be considered. In the prosecution’s case in chief, the victim testified as to the allegation in Count 1 that while she was visiting at defendant’s home, she and defendant were tickling each other and defendant placed his hand under her shirt and

touched her breast. As to the allegation in Count 2, the victim testified that on other occasions defendant had placed her hand on his penis and asked her if she “liked it”. According to the victim, defendant also asked her if she was mad at him, and told her that the touching was “our own little secret” and that she should not tell anyone. The prosecution then introduced the other acts evidence through the testimony of a number of witnesses. Several times during this testimony, the trial court cautioned the jury not to consider the evidence for any purpose other than to determine whether they believed the touchings alleged in Counts 1 and 2 were intentional or accidental.

During closing arguments and again during instructions prior to deliberations, the trial court cautioned the jury as to the limited use of the other acts evidence. Following the jury’s deliberations, defendant was convicted of Count 1 and acquitted on Count 2. On appeal, defendant alleges prosecutorial misconduct in the introduction of, and reference during opening statement and closing argument to, the other acts evidence originally charged as Count 3. Specifically, defendant asserts that the cumulative effect of the prosecution’s use of and reference to the other acts evidence exceeded by inference the limited purpose for which the trial court permitted the evidence to be introduced, thus rising to the level of prosecutorial misconduct.

First, we note that during the trial defendant initially objected to introduction of the other acts evidence as an attempt by the prosecution to establish that defendant had a propensity to commit the crimes alleged. After the trial court ruled that the evidence was admissible, defendant’s objection thereafter was that the prosecution’s actual use of the evidence went beyond the limited purpose permitted by the trial court.

In defendant’s motion for judgment of acquittal following the trial, however, defendant asserted a different ground for objection than he asserted at the trial, claiming instead that the cumulative use by the prosecution of the other acts evidence was such that despite the cautionary instructions of the trial court, the evidence would necessarily be considered by the jury on the improper question of defendant’s propensity to commit the alleged crimes, and therefore its use constituted a prejudicial misuse by the prosecution. On appeal, defendant repeats the assertion raised in the motion for judgment of acquittal, contending that the repeated introduction and reference to the other acts evidence was improper because the emphasis placed on the other acts evidence prejudicially implied that defendant had a propensity to such conduct.

We find that this issue is not properly preserved for appellate review, because the grounds asserted by defendant at trial differ from those being now raised on appeal. MRE 103(a)(1). Accordingly, defendant must show that the prosecution’s conduct amounted to plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

We conclude that defendant is unable to show that a plain error occurred. The challenged evidence was introduced for the proper purpose of refuting the defense of mistake, and both the prosecution and the trial court advised the jury that the evidence should be considered only for this limited purpose, and not as evidence of defendant’s character to show action in conformity therewith. *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998). The prosecution did not make an appeal to the jury to consider the other acts evidence as substantive evidence of

guilt, a practice we held to be improper in *People v Haines*, 105 Mich App 213; 306 NW2d 455 (1981), and *People v Vaughn*, 128 Mich App 270, 272-273; 340 NW2d 310 (1983). Furthermore, the defendant failed to object under MRE 403 that the evidence was cumulative. For all of these reasons, we conclude that the defendant has not shown plain error and the issue is forfeited.

Even if the issue was not forfeited, we conclude there was no prosecutorial misconduct. We consider allegations of prosecutorial misconduct on a case by case basis, examining the relevant sections of the record and reviewing the challenged remarks in context to determine “whether [they] denied the defendant a fair and impartial trial.” *People v McAllister*, 241 Mich App 466, 473; 616 NW2d 203 (2000) (citation omitted).

First, as we have already noted, the evidence introduced by the prosecution and the remarks the prosecution made about the evidence were consistent with the trial court’s ruling permitting the evidence to be introduced for a limited purpose. Second, since the defendant challenged both the veracity of the other acts evidence and the credibility of the victim, the prosecution was permitted to refute defendant’s contention that the evidence should be given little weight. Although we find nothing improper about the prosecution’s argument, we note that a prosecutor may make arguments to a jury on matters that might otherwise not be permitted when the prosecutor does so to respond to arguments the defense has made. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Finally, we note that in addition to the prosecutor’s statements that the other acts evidence was only to be considered by the jury for a limited purpose, the trial court gave no fewer than seven instructions about the limited purpose for which the evidence could be considered. It is clear from the record that defendant was not deprived of a fair and impartial trial, and that there is no basis for reversal. *McAllister*, *supra* at 473.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra